Supreme Court, U.S.
FILED

(1)

93 1942 MAY 31 1994

No. _____

OFFICE OF THE CLERK

In The

Supreme Court of the United States

October Term, 1993

J. WALTER FEMLING and BLAINE COUNTY,

Petitioners,

vs.

EUGENE FARNWORTH,

Respondent.

Petition For Writ Of Certiorari To The Idaho Supreme Court

PETITION FOR WRIT OF CERTIORARI

*DAVID SASSER
JAMES D. CARLSON
M. MICHAEL SASSER
HAMLIN & SASSER, P.A.
802 W. Bannock, Suite 601
P. O. Box 1525
Boise, Idaho 83701
(208) 344-8474

Counsel for Petitioners

*Counsel of Record

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

37 pp

QUESTION PRESENTED

1. Whether the Idaho Supreme Court's denial of qualified immunity in light of the objective reasonableness of Petitioner Femling's actions, and the conclusory allegations by the Respondent, was a misapplication of federal constitutional standards.

LIST OF PARTIES

The parties to the proceeding below were the Petitioners, J. Walter Femling and Blaine County, Idaho, a governmental entity, and the Respondent Eugene Farnworth.

TABLE OF CONTENTS

	Page
QUESTION PRESENTED	i
LIST OF PARTIES	ii
TABLE OF CONTENTS	iii
TABLE OF AUTHORITIES	iv
PETITION FOR WRIT OF CERTIORARI	1
OPINIONS BELOW	1
JURISDICTION	1
STATUTE INVOLVED	1
A CONCISE STATEMENT OF THE CASE	2
REASONS FOR GRANTING THE WRIT	5
CONCLUSION	10

TABLE OF AUTHORITIES

Page

CASES

Anderson v. Creighton, 483 U.S. 635 (1987) 6, 7

Benson v. Allphin, 786 F.2d 268 (7th Cir.), *cert. denied*, 479 U.S. 848 (1986) 7

Celotex Corp. v. Catrett, 477 U.S. 317 (1986) 9

Connick v. Myers, 461 U.S. 138 (1983) 6

Dartland v. Metropolitan Dade County, 866 F.2d 1321 (11th Cir. 1989) 8

Gardner v. Evans, 110 Idaho 925, 716 P.2d 1185 (1986) 9

Harlow v. Fitzgerald, 457 U.S. 800 (1982) 5, 7

Jerome Thriftway Drug, Inc. v. Winslow, 110 Idaho 615, 717 P.2d 1033 (1986) 9

Melton v. Oklahoma City, 879 F.2d 706 (10th Cir. 1989), *overruled on other grounds*, 928 F.2d 920 (10th Cir. 1991) (en banc) 8

Mitchell v. Forsyth, 472 U.S. 511 (1985) 5

Mt. Healthy City Board of Ed. v. Doyle, 429 U.S. 274 (1977) 8, 9, 10

Noyola v. Texas Dept. of Human Resources, 846 F.2d 1021 (5th Cir. 1988) 8

Pickering v. Board of Educ., 391 U.S. 563 (1968) .. 7, 8, 9, 10

STATUTE

42 U.S.C. § 1983 1

PETITION FOR WRIT OF CERTIORARI

Petitioners, J. Walter Femling and Blaine County, respectfully pray that this Court issue a Writ of Certiorari to review or summarily reverse the judgment and opinion of the Idaho Supreme Court in *Eugene Farnworth v. J. Walter Femling and Blaine County*, (March 2, 1994).

OPINIONS BELOW

The opinion of the Supreme Court of the State of Idaho is dated March 2, 1994. The opinion is reported at 94.5 ISCR 229 (1994). A copy of the Idaho Supreme Court's Opinion is included herein at Appendix A, *infra*.

JURISDICTION

The date of the entry of judgment sought to be reviewed is March 2, 1994. This Court has jurisdiction of this matter pursuant to 28 U.S.C. § 1257. This Petition for Writ of Certiorari is filed within the time allowed under Rule 13(1) of the Rules of this Court.

STATUTE INVOLVED

1. 42 U.S.C. § 1983 provides:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within

> the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action of law, suit in equity, or other proper proceeding for redress. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia should be considered to be a statute of the District of Columbia.

A CONCISE STATEMENT OF THE CASE

On March 7, 1989, the Respondent, Eugene Farnworth, through his attorney, filed his Complaint against the Petitioners alleging, *inter alia*, a violation of his constitutional right of free speech, assembly, and association under the First and Fourteenth Amendments of the United States Constitution and pursuant to 42 U.S.C. § 1983. The Respondent alleged he had been terminated from his employment as a deputy sheriff by Sheriff J. Walter Femling in violation of said constitutional rights. (Record, Vol. I, pp. 1-6.) The Petitioners answered, and by way of an affirmative defense, alleged that Sheriff Femling was entitled to qualified immunity. (Record, Vol. I, p. 14.) Thereafter, discovery was undertaken by all parties to the case and it was shown that Respondent had no factual basis to support any claim that there was any "free speech, assembly, and/or association" violations. (Farnworth Dep., pp. 74-76.) The Respondent could not identify any occasion where the Sheriff prohibited him from exercising his rights of free speech, his right to assembly, or his right of association. The Respondent also

admitted during his deposition that he knew of no admissible evidence supporting his claim that Petitioner Femling terminated him in retaliation for exercising his constitutional rights. It was Respondent's *belief*, as testified to in his deposition, that he was not reappointed due to his running for the office of sheriff against Petitioner Femling. (Farnworth Dep., p. 80.)

As detailed in Appendix B, in the months preceding the Respondent's nonreappointment by Petitioner Femling, the Respondent was subject to complaints that involved:

> False accusations of theft concerning other sheriff's department members and discussing the same with other employees;
>
> Making derogatory remarks to members of the department and other law enforcement members;
>
> False accusations against other employees;
>
> Disrupting the operations of the sheriff's office by telling employees they would be fired if he became sheriff;
>
> Spending much of his shift time in the office instead of patrolling;
>
> Spending his shift reviewing bills and clerks records;
>
> Criticisms of the drug task force and divulging of top secret information;
>
> Placing unnecessary and incomplete information in reports;

> Acts of badgering other officers within both the sheriff's department and the city police department;
>
> Insulting and otherwise improperly treating citizens;
>
> Improper attitude toward the department and its employees; and
>
> Disobeying orders and failure to perform his duties.
>
> (Femling Dep., Exhibit Nos. "9", "10", and "11".)

Out of the approximately nineteen (19) reasons for the Respondent's nonreappointment, the following was also listed by Sheriff Femling:

> In September and October, 1988, Officer Farnworth made public and written statements concerning the present Blaine County administration. *For example,* Officer Farnworth's campaign ads stated "Elect a sheriff that will be a sheriff for all of Blaine County" and "Elect a hard working and honest sheriff." (Emphasis added.)

The trial court ruled that Sheriff Femling be granted summary judgment on the grounds of qualified immunity. (Record, Vol. II, p. 248.) In May of 1992, another trial court judge, assigned due to the initial judge's voluntary withdrawal (Record, Vol. II, p. 258), reviewed the issue and again ruled that Sheriff Femling was entitled to qualified immunity. (Record, Vol. V, p. 618.)

REASONS FOR GRANTING THE WRIT

The Idaho Supreme Court's ruling, concerning whether the law was clearly established and the objective reasonableness of Petitioner Femling's conduct, directly contravenes the instructions of this Court and is at odds with other federal circuits. That ruling raises a critical question of federal law in First Amendment cases wherein qualified immunity is raised; that question should be finally and completely addressed by this Court. This case also presents an opportunity for this Court to foster a clear approach for both federal and state courts regarding qualified immunity and First Amendment claims. A review of the case law from lower courts over the years indicates an overall inconsistency and confusion with respect to this subject.

The Plaintiff's Complaint contained allegations of malicious conduct by Petitioner Femling. (Record, Vol. I, pp. 3 and 113.) This Court's ruling in *Harlow v. Fitzgerald*, 457 U.S. 800 (1982), involved defining the limits of qualified immunity in objective terms so that "mere allegations of malice" will no longer "suffice to subject government officials either to the costs of trial or the burdens of broad reaching discovery." *Id.* at 817-18. Accordingly, *Harlow* formulated the "objective reasonableness" standard.

Thereafter, in *Mitchell v. Forsyth*, 472 U.S. 511, 526, (1985), this Court detailed those proceedings contemplated by the *Harlow* standard:

> Unless the plaintiff's allegations state a claim of violation of clearly established law, a defendant

> pleading qualified immunity is entitled to dismissal before the commencement of discovery . . . . Even if the plaintiff's complaint adequately alleges the commission of acts that violated clearly established law, the defendant is entitled to summary judgment if discovery fails to uncover evidence sufficient to create a genuine issue as to whether the defendant in fact committed those acts.

In *Anderson v. Creighton*, 483 U.S. 635, 640 (1987), the objective reasonableness standard was held to require that the contours of the right be "clearly established" to the extent that the unlawfulness of infringement was apparent to the governmental official. Such an unlawful violation does not exist in First Amendment cases if an individual acts pursuant to superior interests such as the effective and efficient operations of the sheriff's department. *See Connick v. Myers*, 461 U.S. 138, 150 (1983).

It is undeniable that one of the nineteen (19) charges that Petitioner Femling cited as an *example* referred to Respondent Farnworth's campaign ads which stated, "Elect a sheriff that will be a sheriff for all Blaine County" and "Elect a hard working and honest sheriff." To foster brevity and focus, it is presumed for the purposes of this proceeding that the above-stated example is encompassed within the rights that arise pursuant to the First Amendment and touches upon a matter of public concern. The focus, however, is upon the fact that discovery for over a two year period of time failed to substantiate that the Respondent's electioneering was a substantial factor which led to his nonreappointment and upon the

state of the law which affords a finding of objective reasonableness for Petitioner Femling's actions.

To provide the protections afforded by the qualified immunity defense, the justification for the employer's action must be taken into account in determining whether the nonreappointment of the Respondent was *objectively reasonable*. *Anderson*, 483 U.S. at 639. Based upon the state of the law and the situation presented by the facts of this case, any reasonable sheriff in Petitioner Femling's position would have believed the nonreappointment of the Respondent to be lawful. From such a result, qualified immunity should naturally flow.

Excluding the one free speech ground listed as an example, there were eighteen (18) other grounds for nonreappointment that provided more than ample grounds for nonreappointment. The Respondent's acts of insulting, disobedient, untruthful, and disruptive conduct were precisely the types of conduct that any public official would be duty bound to take action upon. These grounds provided the basis for Petitioner Femling's discretionary decision to not reappoint the Respondent and, importantly, the Respondent produced no evidence to the contrary.

At the time Petitioner Femling made his decisions, at least four (4) federal circuit courts had concluded that because the balancing test set forth in *Pickering v. Board of Educ.*, 391 U.S. 563, 568 (1968), turns upon a fact intensive balancing process, it can rarely, if ever, be considered to be "clearly established" within the qualified immunity test announced in *Harlow*. As stated in *Benson v. Allphin*, 786 F.2d 268, 276 (7th Cir.), *cert. denied*, 479 U.S. 848

(1986): "With *Harlow's* elimination of the inquiry into the actual motivations of the official, qualified immunity typically casts a wide net to protect government officials from damage liability whenever balancing is required." *See also Melton v. Oklahoma City*, 879 F.2d 706, 728-29 (10th Cir. 1989), *rev'd on other grounds*, 928 F.2d 920 (10th Cir. 1991) (en banc); *Dartland v. Metropolitan Dade County*, 866 F.2d 1321, 1324 (11th Cir. 1989); *Noyola v. Texas Dept. of Human Resources*, 846 F.2d 1021, 1024 (5th Cir. 1988) ("[t]here will rarely be a basis for a *priori* judgment that the termination or discipline of a public employee violated [his] 'clearly established constitutional rights' "). Thus, the *Pickering* balancing test afforded no clearly established law for Petitioner Femling to follow and consequently, his nonreappointment of the Respondent when faced with the Respondent's eighteen (18) other types of misconduct was objectively reasonable.

In accordance with this Court's decision in *Mt. Healthy City Board of Ed. v. Doyle*, 429 U.S. 274 (1977), the employee also has the burden of showing that the protected activity was a substantial or motivating factor in the decision of the public employer to take adverse action against the employee's employment. Only in the event that the former employee makes such a showing, does the burden shift to the employer to prove that it would have reached the same decision, even in the absence of the allegedly protected conduct. *Mt. Healthy*, 429 U.S. at 287. It is critical, however, to recognize that the employee must meet his burden of showing that the speech in issue was a substantial or motivating factor in the employee's discharge before liability, and consequently, unlawfulness can attach. *Mt. Healthy*, 429 U.S. at 287. The lower courts

in the present case were faced only with the Respondent's *belief* that he was not reappointed due to his running for the office of sheriff against Petitioner Femling. Improperly, the Idaho Supreme Court only applied one phase of the test, i.e., *Pickering*, and did not even consider *Mt. Healthy* as applicable. Essentially, the lower court released the Respondent from his "*Mt. Healthy* burden" and found only the *Pickering* balancing test to be applicable. In light of the Respondent's failure of proof on this issue, qualified immunity should have been afforded.

The law facing Petitioner Femling at the state level also supported the actions he took and confirmed the reasonableness of his conduct. In *Gardner v. Evans*, 110 Idaho 925, 716 P.2d 1185 (1986), it was held that critical comments made by the former director of the commission of a governmental entity regarding the governor's proposed reorganization of the entity, were not a substantial factor in her discharge and that "mere allegations do not suffice in the face of the defendants depositions." *Gardner*, 110 Idaho 925, 934. In the present case, the Respondent is in the same position as the plaintiff in *Gardner*. Having produced mere allegations by way of his Complaint, and in failing to meet the *Mt. Healthy* burden to show that his electioneering was a motivating or substantial factor in his nonreappointment, summary judgment should have been properly afforded to Petitioner Femling on the basis of qualified immunity. *See Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986); *See also Jerome Thriftway Drug, Inc. v. Winslow*, 110 Idaho 615, 717 P.2d 1033 (1986).

CONCLUSION

When discovery for over a two year period of time failed to substantiate that in fact the Respondent's electioneering was a motivating or substantial factor leading to his nonreappointment, and when the eighteen (18) other grounds for nonreappointment provided more than an ample foundation for nonreappointment, qualified immunity should have been granted. The Idaho Supreme Court by focusing upon the single ground relating to Respondent Farnworth's campaign ads, failed to consider the other facts concerning Respondent Farnworth's conduct that made the nonreappointment objectively reasonable.

By skipping the *Mt. Healthy* requirement that the employee meet his burden in showing that the protected speech was a substantial or motivating factor in his discharge, and by then foisting only the unclear and factually complex *Pickering* balancing test upon Petitioner Femling, the Idaho Supreme Court failed to uphold the qualified immunity mandate of freedom from suit when the case consisted of mere allegations, and when Petitioner Femling's actions were objectively reasonable. Accordingly, the decision of the Idaho Supreme Court denying Petitioner Femling qualified immunity should be summarily reversed and the trial court's orders reinstated.

RESPECTFULLY SUBMITTED this 27th day of May, 1994.

HAMLIN & SASSER, P.A.

M. MICHAEL SASSER,
Of the Firm
Attorneys for Respondents

APPENDIX "A"

1994 Opinion No. 24
IN THE SUPREME COURT
OF THE STATE OF IDAHO
No. 20109

Cite as: 94.5 ISCR 229

EUGENE FARNWORTH,
Plaintiff-Appellant,

v.

J. WALTER FEMLING AND BLAINE COUNTY,
Defendants-Respondents.

Appeal from the District Court of the Fifth Judicial District, State of Idaho, Blaine County. Hon J. William Hart, District Judge.

Appeal from summary judgments dismissing claims. *Affirmed in part; vacated in part; and remanded.*

ATTORNEYS:

E. Lee Schlender, Hailey, Idaho, attorney for appellant.

Hamlin & Sasser, Boise, Idaho, attorneys for respondents. James D. Carlson argued.

Twin Falls, November 1993 Term
Filed: March 2, 1994
Frederick C. Lyon, Clerk

JOHNSON, Justice

This is a public employment case. We affirm the trial court's summary judgment dismissing the employee's claims for breach of implied contract of employment and

for breach of the implied covenant of good faith and fair dealing. We conclude that the trial court should not have granted summary judgment dismissing the employee's federal civil rights First Amendment claim and the employee's tort of wrongful discharge claim.

I.

THE BACKGROUND AND PRIOR PROCEEDINGS.

Eugene Farnworth was hired in 1977 as a deputy sheriff for Blaine County (the county). Farnworth worked for the county until 1988, when there was an election for sheriff. The incumbent sheriff, J. Walter Femling, announced his candidacy for sheriff on approximately April 1, 1988. Farnworth unsuccessfully opposed Femling in the primary election in May. Farnworth then switched parties and unsuccessfully opposed Femling in the general election in November.

During the election campaign, Femling says he received numerous complaints from citizens and coworkers about Farnworth's conduct and performance as deputy sheriff. Femling wrote "letters of concern" concerning these complaints and placed them in Farnworth's personnel file. The first of these letters is dated April 4, 1988.

Following the general election, Femling met with Farnworth and informed Farnworth that Femling did not intend to reappoint Farnworth as a deputy sheriff when Femling commenced his new term as sheriff. In this conference, Femling said Farnworth had attacked Femling during the campaign by running ads stating, "Elect a Sheriff that will be a Sheriff for all of Blaine County."

Femling offered Farnworth a hearing to review the reasons for his dismissal and to give Farnworth an opportunity to respond to the charges against him. Among the charges was the following:

> In September and October, 1988, Officer Farnworth made public and written statements concerning the present Blaine County administration. For example, Officer Farnworth's campaign ads stated "Elect a sheriff that will be a sheriff for all of Blaine County" and "Elect a hard working and honest sheriff."

Farnworth chose not to attend the hearing and offered his explanation concerning the charges by a letter from his attorney. After reviewing this letter, Femling determined that Farnworth had no adequately refuted the charges against him and suspended Farnworth with pay until Femling appointed a new deputy to replace him.

By a letter dated February 21, 1989, Farnworth filed a notice of claim with the county, pursuant to the Idaho Tort Claims Act (ITCA). On March 7, 1989, Farnworth sued Femling and the county seeking damages for wrongful termination under 42 U.S.C. § 1983. Farnworth also requested that he be allowed to amend the complaint "to add additional actions and tort claims as may be necessary upon denial of a tort claim filed against Blaine County for torts and actions not specifically limited to those provided for by 42 U.S.C. § 1983, upon denial of said claim by Blaine County."

Femling and the county moved for summary judgment.

Farnworth moved for leave to amend his complaint. The trial court granted Farnworth's motion, and on May 21, 1990, Farnworth filed an amended complaint, restating the allegations of the original complaint and adding claims for: (1) breach of an express employment contract; (2) breach of the implied covenant of good faith and fair dealing; and (3) the tort of wrongful discharge. Femling and the county renewed their motion for summary judgment.

The trial court, District Judge May presiding, granted summary judgment to both Femling and the county on all issues. several weeks later, the trial court issued an amended decision denying summary judgment on the breach of express employment contract and the breach of implied covenant of good faith and fair dealing claims. Shortly after issuing this decision, Judge May disqualified himself, and the case was assigned to District Judge Hart.

Nearly two years later, Femling and the county filed another motion for summary judgment. In this motion Femling and the county argued that no genuine issue of material fact existed with regard to Farnworth's claims for breach of an express with regard to Farnworth's claims for breach of an express employment contract and for breach of the implied covenant of good faith and fair dealing. Shortly thereafter, Farnworth filed a motion asking that the court construe his amended complaint to include a tort claim pursuant to ITCA. Farnworth also filed a motion for reconsideration of Judge May's order granting summary judgment.

The trial court denied summary judgment on the breach of express employment contract claim and granted

summary judgment to Femling and the county on the breach of the implied covenant of good faith and fair dealing claim. The trial court reaffirmed the summary judgment on Farnworth's federal civil rights claims against Femling and the county. The trial court concluded that the civil rights claim against Femling was barred under the doctrine of qualified immunity, and that the civil rights claim against the county failed to articulate a fundamental constitutional right which had been violated as required by *Monell v. New York City Dept. of Social Services*, 436 U.S. 658, 98 S. Ct. 2018, 56 L. Ed. 2d 611 (1978).

The trial court also concluded that Farnworth's ITCA claim was barred because the amended complaint related back to the date of the original complaint. The trial court said Farnworth's ITCA claim therefore violated the requirement of ITCA that a claimant wait ninety days after filing a notice of claim with the county before filing a lawsuit.

Subsequently, the trial court ruled that Farnworth had not pleaded a claim for breach of implied contract of employment. Pursuant to a stipulation of the parties, the trial court dismissed Farnworth's breach of express employment contract claim.

Farnworth appealed.

II.

THERE ARE GENUINE ISSUES OF MATERIAL FACT CONCERNING THE QUALIFIED IMMUNITY DEFENSE.

Farnworth asserts that the trial court should not have granted summary judgment on his federal civil rights

claim against Femling under the First Amendment on the basis of qualified immunity. We agree.

We first note that Farnworth's lack of a right to continued employment is immaterial to the viability of his First Amendment claim. Regardless of the nature of the employment, a public employer "may not deny a benefit to a person on a basis that infringes [the person's] constitutionally protected interests – especially, [the person's] interest in freedom of speech." *Rutan v. Republican Party of Illinois*, 497 U.S. 62, 72, 110 S. Ct. 2729, 2736, 111 L. Ed. 2d 52, 65 (1990) (emphasis omitted) (quoting *Perry v. Sindermann*, 408 U.S. 593, 597, 92 S. Ct. 2694 2697, 33 L. Ed. 2d 570, 577 (1972)).

In *Arnzen v. State*, 123 Idaho 899, 854 P.2d 242 (1993), the Court stated a three-part test to determine whether a party asserting qualified immunity is entitled to the defense:

1. Was there a clearly established law?
2. Did the conduct of the party asserting qualified immunity violate a clearly established right of the party claiming the violation?
3. Was the conduct of the party asserting qualified immunity reasonable?

Id. at 904, 854 P.2d at 247.

In this case, there was a clearly established law. A public employer may not enforce conditions of employment that infringe on an employee's constitutional right of free speech. *Connick v. Myers*, 461 U.S. 138, 142, 103 S. Ct. 1684, 1687, 75 L. Ed. 2d 708, 716-17 (1983); *Gardner v. Evans*, 110 Idaho 925, 933, 719 P.2d 1185, 1193 (1986).

Whether Femling's conduct violated Farnworth's First Amendment rights depends on whether Femling took adverse action against Farnworth because Farnworth exercised these rights. The resolution of this question first requires us to examine whether Farnworth's speech that was noted by Femling in his charges against Farnworth was speech protected under the First Amendment. Whether Farnworth's speech was constitutionally protected entails a balancing of the interests of Farnworth in commenting upon matters of public concern against the employer's interest in promoting the "efficiency of the public services it performs through its employees." *Pickering v. Board of Education*, 391 U.S. 563, 568, 88 S. Ct. 1731, 1735, 20 L. Ed. 2d 811, 817 (1968). Under this analysis, Farnworth has the initial burden to show that his conduct was constitutionally protected. *Mt. Healthy City Board of Ed. v. Doyle*, 429 U.S. 274, 287, 97 S. Ct. 568, 576, 50 L. Ed. 2d 471, 484 (1977).

In *Lubcke v. Boise City/Ada Cty. Hous. Auth.*, 93.19 ISCR 1086, ___ Idaho ___, 860 P.2d 653 (1993), the Court recently noted: "[I]t is clearly settled law that government officials cannot terminate public employees for exercising their First Amendment rights to speak on a matter of public concern except in limited circumstances." *Id.* at ___, 93.19 ISCR at 1093, 860 P.2d at 668. Citing *Pickering*, 391 U.S. at 570 n.3, 88 S. Ct. at 1735 n.3, 20 L. Ed. 2d at 818 n.3, the Court stated:

> [D]ismissal for the exercise of First Amendment rights might be permissible in cases where the need for confidentiality is great or in cases where the relationship between the "superior

> and subordinate is of such a personal and intimate nature that certain forms of public criticism would seriously undermine the effectiveness of the working relationship between them."

Lubcke, 93.19 ISCR at 1093, ___ Idaho at ___, 860 P.2d at 668.

The Court also noted that "[t]he inquiry into the protective status of the speech is one of law, not fact." *Id.* (quoting *Connick*, 461 U.S. at 148 n.7, 103 S. Ct. at 1690 n.7, 75 L. Ed. 2d at 720 n.7).

In deciding whether Farnworth's speech was protected, we must first determine if Farnworth's speech involved a matter of public concern. If it did, we must decide whether there were genuine issues of material fact concerning the four factors set out in *Pickering:*

1. the effect of Farnworth's speech on the discipline and harmony among co-worekrs;
2. the employer's need for confidentiality;
3. whether the speech impeded Farnworth in competently performing his daily duties; and
4. the need to encourage a close and personal relationship involving loyalty and confidence between Farnworth and Femling.

Lubcke, 93.19 ISCR at 1093, ___ Idaho at ___, 860 P.2d at 668.

We conclude that Farnworth's speech concerning the type of sheriff the county needed was a matter of public concern. Farnworth's statements about a sheriff for all of

the county and a hard working and honest sheriff relate to matter about which the public is concerned – the type of office holder a candidate for public office will be.

Although there is evidence indicating some disruption in the sheriff's department because of some other conduct and speech of Farnworth, there is no evidence that Farnworth's statements about electing a sheriff for all the county and a hard working and honest sheriff created any disruption. Therefore, on the basis of the record now before us, employing the *Pickering* factors, we conclude that this speech was protected by the First Amendment, and it was not reasonable for Femling to take adverse action against Farnworth based on these statements. For this reason, the trial court should not have granted summary judgment to Femling on the basis of qualified immunity.

For guidance to the trial court on remand, we point out that once a public employee has established that the employee's activity was constitutionally protected, the employee then has the burden of showing that the protected activity was a substantial or motivating factor in the decision of the public employer to take adverse action against the employee's employment. If the employee carries this burden of going forward, the burden of going forward then shifts to the employer, who may avoid liability by showing by a preponderance of the evidence that the same decision would have been made absent the constitutionality protected conduct. *Mt. Healthy*, 429 U.S. at 287, 97 S. Ct. at 576, 50 L.Ed.2d at 484.

III.

FARNWORTH FAILED TO STATE A CLAIM FOR BREACH OF AN IMPLIED CONTRACT OF EMPLOYMENT.

Farnworth asserts that he pleaded a claim for breach of an implied contract of employment. We disagree.

Farnworth alleged that he "was a permanent employee as defined by the Manual and by the facts and circumstances surrounding his employment" and that Femling and the county breached his express contract of employment "as well as the implied covenant of fair dealing. . . . " Farnworth argues that these allegations, read together, set out a breach of implied contract theory. The trial court ruled that an implied contract claim was "not at issue by the pleadings."

An implied in fact contract is defined as one where the terms and existence of the contract are manifested by the conduct of the parties with the request of one party and the performance by the other often being inferred from the circumstances attending the performance. *Clemenis v. Jungert*, 90 Idaho 143, 153, 408 P.2d 810, 815 (1965).

Pleadings should be liberally construed. *Stewart v. Arrington Construction Company*, 92 Idaho 526, 530, 446 P.2d 895, 899 (1968) (doubts concerning the sufficiency of a complaint should be resolved in favor of the complainant). *See also* I.R.C.P. 8(f) (all pleadings shall be so construed as to do substantial justice). *Cf.* I.R.C.P. 8(a)(1) (a pleading shall contain a short and plain statement of the claim showing that the pleader is entitled to relief). Even liberally construing Farnworth's pleadings, however, we

conclude that Farnworth did not state a claim for breach of an implied contract of employment.

Farnworth did not specifically allege that there was an implied contract of employment. The allegations concerning "the facts and circumstances of his employment," upon which Farnworth relies, were part of his civil rights claim brought pursuant to 42 U.S.C. § 1983. The allegations concerning the breach of the implied covenant of good faith and fair dealing speak for themselves. (*See* part IV, below.) These allegations cannot be construed to plead the breach of an implied contract. In addition, Farnworth never directly addressed the implied contract claim in his briefs opposing the various summary judgment motions, nor did he move to amend his pleadings to include such a claim.

IV.

THE TRIAL COURT CORRECTLY GRANTED SUMMARY JUDGMENT DISMISSING FARNWORTH'S BREACH OF THE IMPLIED COVENANT OF GOOD FAITH AND FAIR DEALING CLAIM.

Farnworth asserts that the trial court should not have granted summary judgment dismissing his breach of the implied covenant of good faith and fair dealing claim. We disagree.

Farnworth relies on *Sorensen v. Comm Tek, Inc.*, 118 Idaho 664, 700 P.2d 70 (1990), for the application of the covenant of good faith and fair dealing to employment at will. In *Sorensen*, the Court adopted the plurality opinion in *Metcalf v. Intermountain Gas Co.*, 116 Idaho 622, 778 P.2d

744 (1989), which announced this application of the covenant. *Sorensen,* 118 Idaho at 669, 799 P.2d at 75. The plurality opinion in *Metcalf* applied the covenant "prospectively to breaches or violations of the covenant occurring after the effective date of [the *Metcalf*] opinion, and to the claims in [*Metcalf*]." *Metcalf,* 116 Idaho at 628, 778 P.2d at 750. In *Sorensen,* the Court concluded "that the *Metcalf* opinions should be applied to all cases which had been filed at the time that the *Metcalf* opinion was issued on August 8, 1989." *Sorensen,* 118 Idaho at 669, 799 P.2d at 75.

Farnworth amended his complaint on May 21, 1990, adding a claim for breach of the implied covenant of good faith and fair dealing. This claim related back to March 7, 1989, the date Farnworth filed the original complaint. I.R.C.P. 15(c). Therefore, Farnworth is entitled to the application of the covenant of good faith and fair dealing developed by the plurality in *Metcalf* and reaffirmed by the Court in *Sorensen,*.

Farnworth contends that the county and Femling breached the covenant when they "terminated his permanent employment without good cause." This application of the covenant was rejected in *Metcalf,* when two justices agreed with the following statement of the Arizona Supreme Court in *Wagenseller v. Scottsdale Memorial Hosp.,* 710 P.2d 1025, 1040-41 (Ariz. 1985) (en banc):

> We . . . recognize an implied covenant of good faith and fair dealing in the employment-at-will contract, although that covenant does not create a duty for the employer to terminate the employee only for good cause. The covenant does not protect the employee from a "no cause"

> termination because tenure was never a benefit inherent in the at-will agreement.

Metcalf, 116 Idaho at 627, 778 P.2d at 749.

By the adoption in *Sorensen*, of the plurality opinion in *Metcalf*, the Court included this limitation on the application of the covenant. This forecloses Farnworth's suggested application of the covenant in this case.

V.

THE TRIAL COURT SHOULD NOT HAVE DISMISSED FARNWORTH'S ITCA CLAIM ON THE GROUND THAT IT WAS FILED PREMATURELY.

Farnworth asserts that the trial court should not have dismissed his ITCA claim contained in the amended complaint on the ground it was filed prematurely. We agree.

ITCA contains a procedure for a claimant to file a tort claim against a governmental entity. I.C. §§ 6-906, 6-906A, and 6-907. ITCA also provides:

> ***If the claim is denied,*** a claimant may institute an action in the district court against the governmental entity or its employee in those circumstances where an action is permitted by this act.

I.C. § 6-910 (emphasis added).

Farnworth mailed his notice of claim to the county on February 21, 1989, and filed his original complaint on March 7, 1989. The original complaint requested that Farnworth be allowed to amend his original complaint "to add additional actions and tort claims as may be necessary upon denial of a tort claim filed against" the

county. The county is deemed to have denied the claim by its failure to approve or deny the tort claim within ninety days. I.C. § 6-909. On May 21, 1990, Farnworth amended his complaint to include a claim under ITCA.

If a notice of claim is not filed with the governmental entity within the time permitted by ITCA, the claimant is barred from bringing suit under ITCA. I.C. §§ 6-907, 6-908; *McQuillen v. City of Ammon*, 113 Idaho 719, 722, 747 P.2d 741, 744 (1987). This case presents a different question, however.

The trial court ruled that the ITCA claim contained in the amended complaint relates back to the date of filing the original complaint, necessitating the dismissal of the ITCA claim, because it was filed prematurely in violation of I.C. § 6-910. The trial court relied on I.R.C.P. 15(c) which provides, in part:

> Whenever the claim or defense asserted in the amended pleading arose out of the conduct, transaction, or occurrence set forth or attempted to be set forth in the original pleading, the amendment relates back to the date of the original pleading.

This provision is curative, not restrictive. If a claim or defense asserted in an amended pleading would be barred by the statute of limitations, under the terms of I.R.C.P. 15(c), this limitation may be cured by relating back to the date of the original pleading. It was not correct to apply I.R.C.P. 15(c) to restrict Farnworth's ITCA claim in this action.

We also note that the trial court relied on *Curtis v. City of Ketchum*, 111 Idaho 27, 720 P.2d 210 (1986), in

dismissing Farnworth's ITCA claim for being filed prematurely. This reliance is misplaced. *Curtis* was an appeal of a denial of various subdivision plat applications. The only reference to ITCA in *Curtis* was to the trial court's ruling that the plaintiff was barred from seeking relief under ITCA because the plaintiff failed to wait ninety days after filing a claim with the city before filing the action in district court. At oral argument before the Idaho Supreme Court, plaintiff's counsel conceded that no tort claims action was presented by the case. *Id.* at 30 n.1, 720 P.2d at 213 n.1. Therefore, the Court did not consider any ITCA claim in the appeal. Rather, the Court in *Curtis* held that the plaintiff was precluded from challenging the city's actions denying his subdivision application because he failed to seek review of the city's action within sixty days as required by I.C. §§ 67-6519 through 67-6521(d). *Id.* at 33, 720 P.2d at 216. Therefore, *Curtis* does not require that Farnworth's ITCA claim be dismissed because it was filed prematurely.

VI.

CONCLUSION.

We affirm the trial court's summary judgment dismissing Farnworth's claims for breach of an implied employment contract and for breach of the implied covenant of good faith and fair dealing. We vacate the trial court's summary judgment dismissing Farnworth's federal civil rights claim and his tort of wrongful discharge claim. We remand the case for further proceedings.

Because of the mixed result, we award no costs on appeal, nor do we find it appropriate to award attorney fees on appeal.

McDEVITT, CJ., BISTLINE, TROUT and SILAK, JJ., concur.

APPENDIX "B"

AMENDED NOTICE OF CHARGES

Re: Eugene Farnworth's violations of the Blaine County Sheriff's Deputy Policy and Procedures Manual.

1. § 303.025: Insubordination.

   (a) – On or about the end of April or first of May Sheriff Femling told Officer Farnworth to start every shift in Gannett and write citations for speeding violations. Officer Farnworth failed to comply with Sheriff Femling's request.

   (b) – Before the Labor Day weekend, Officer Farnworth was directed by Sheriff Femling to serve Grand Jury subpoenas. Sheriff Femling witnessed Officer Farnworth campaigning on Labor Day in Bellevue. Ron Taylor of the Bellevue Marshal's Office informed Sheriff Femling that he observed Officer Farnworth campaigning in Bellevue and that Officer Farnworth asked Ron Taylor to assist him in campaigning. On Labor Day, Dana Pidgeon also witnessed Officer Farnworth removing election material from the trunk of his patrol vehicle and distributing the campaign material to citizens in Bellevue.

2. § 303.029: Derogatory remarks.

   (a) – In April, 1988, Officer Farnworth made comments in the dispatch area of the Blaine County Sheriff's Office to Blaine County Sheriff employees accusing Sandy Conklin of being dishonest. In April, 1988, Officer Farnworth admitted to Officer Ramsey that he had made statements Sandy Conklin was dishonest.

   (b) – On April 2, 1988, Officer Farnworth told Sheriff Femling that Evelyn Peterson and Dana Hillman were dishonest.

(c) – In May, 1988, Officer Farnworth told Gene Ramsey that Officer Pidgeon is worthless and that Officer Farnworth was going to change his job or fire him when he became sheriff. Officer Pidgeon was advised of Officer Farnworth's statements by Gene Ramsey and, in turn, Officer Pidgeon confronted Officer Farnworth with the statements on June 3rd, 1988.

(d) – In March, April & July, 1988, Officers Ramsey and Fuller and Sheriff Femling overhead Officer Farnworth make derogatory remarks towards the Blaine County Drug Task Force. Officer Farnworth made the following statements to the effect:

(1) The task force is a waste of time;

(2) If you ask me, the task force is worthless;

(3) They don't know what the hell they're doing; and

(4) He's tired of all this secret "I spy."

3. §303.031: Statements concerning administration.

(a) – In September and October, 1988, Officer Farnworth publicly released information regarding the Blaine County Sheriff's Office policies for patrol, the Drug Task Force and scheduling.

(b) – In September and October, 1988, Officer Farnworth made public and written statements concerning the present Blaine County administration. For example, Officer Farnworth's campaign ads stated "Elect a sheriff that will be a sheriff for all of Blaine County" and "Elect a hard working and honest sheriff."

4. §303.033: Relationships with others.

Blaine County employees, other law enforcement departments and citizens complained about Officer

Farnworth being disrespectful. The letters attached to the prosecutor's letter dated December 12, 1988 and this letter describe the events, dates and persons involved in the complaints. In the Fall of 1988, Ketchum Officer Tony Plott had to rectify the incorrect and disrespectful comments by publishing a letter to the Editor.

5. §303.035: Criticisms of the Department.

(a) – In September and October, 1988, Officer Farnworth criticized employees of the Blaine County Sheriff's office as being lazy and criticized the department in that there was inter-turmoil within the department. Officer Farnworth accused the Blaine County Sheriff's Office of not being able to get along with other departments.

(b) – On July 3rd, 1988, Officer Farnworth wrote a theft report concerning a theft in Carey, Idaho, in which Officer Farnworth reported criticism towards the Blaine County Sheriff's Office. (See the report attached to the Prosecutor's letter dated December 12, 1988.)

6. §303.037: Criticisms of personal nature.

In April, May, September and October, 1988, Officer Farnworth made statements concerning the personal character of certain members of the Blaine County Sheriff's Office – Sandy Conklin, Pat Pidgeon, Dana Hillman, Evelyn Peterson, Gene Ramsey and Walt Femling. For instance, Officer Farnworth informed Sheriff Femling that Evelyn Peterson and Dana Hillman were stealing pop money and that Chief Deputy Ramsey was covering up the thefts.

7. §303.041; Communication of a confidential nature.

   In July, 1988, Officer Farnworth criticized a drug task force case involving an investigation in California. Officer Farnworth informed several law enforcement officers that the officers involved in the case were going on vacation.

8. §303.073: Loitering in station.

   The Blaine County Sheriff's Office staff informed Sheriff Femling that in April, May, June and July, 1988, Officer Farnworth was spending a good portion of his shift in the office. The reports indicated that Officer Farnworth was reviewing bills and record clerk's books rather than patrolling.

9. §303.083: Profanity or uncomplimentary speech.

   The letters attached to the Prosecutor's letter dated December 12, 1988, and the statements contained in this letter, describe the facts, dates and persons involved in this charge.

10. §303.111: Unsatisfactory performance.

    In 1987 Officer Farnworth issued 140 citations and had four (4) DUI arrests between April through December, 1987. Between January and November, 1988, Officer Farnworth issued 41 citations and had one (1) DUI arrest. Of the 41 citations, 27 citations were issued to out-of-county people. On July 22, 1988 Sheriff Femling reprimanded Officer Farnworth for his lack of productivity. On July 22, 1988 Officer Farnworth admitted to Sheriff Femling that he has slacked off.

11. §303.453: Political activity.

    (a) – In April, 1988, Officer Farnworth failed to give Sheriff Femling written notice 120 days prior to filing for the election of the Blaine County Sheriff.

(b) – In April, 1988, Officer Farnworth was asked by Sheriff Femling to take a non-paid leave of absence in order to keep an orderly and efficient operation of the department.

12. §303.407: Unbecoming conduct.

The statements made by citizens who describe Officer Farnworth as being unprofessional and/or a poor reflection upon the Blaine County Sheriff's Office are attached to the letter of the Prosecutor dated December 12, 1988. The dates, persons and events involved in this charge are contained therein.